

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
EASTERN WASHINGTON REGION  
STATE OF WASHINGTON

LARSON BEACH NEIGHBORS AND JEANIE  
WAGENMAN,

Petitioner(s),

v.

STEVENS COUNTY,

Respondent.

Case No. 07-1-0013

**THIRD ORDER ON COMPLIANCE –  
FINDING CONTINUING NON-  
COMPLIANCE**

**I. SYNOPSIS**

This matter comes before the Board on a telephonic Compliance Hearing held on January 30, 2013. Board members Charles Mosher and Raymond Paoella attended, with Board Member Mosher presiding. Petitioners were represented by Jeanie Wagenman. Stevens County was represented by Peter G. Scott. Between 2008 and 2013, the Board has issued three separate Orders Finding Non-Compliance with the GMA for Stevens County's failure to amend its development regulations with specific review guidelines or design standards to reduce its subdivision construction impacts in order to protect critical areas. Although the County has amended its regulations to provide for additional review, the County still does not provide clear review guidelines or design standards which can direct appropriate development and construction actions to protect the functions and values of critical areas from the effects of storm water discharge and impervious coverage.

Therefore, with this Third Compliance Order, the matter is again remanded to the County to take the necessary legislative actions to bring it into compliance with the GMA.

## II. BURDEN OF PROOF

After the Board has entered a finding of non-compliance, the local jurisdiction is given a period of time to adopt legislation to achieve compliance.<sup>1</sup> After the period for compliance has expired, the Board is required to hold a hearing to determine whether the local jurisdiction has achieved compliance.<sup>2</sup> For purposes of Board review of the comprehensive plans and development regulations adopted by local governments in response to a non-compliance finding, the presumption of validity applies and the burden is on the challenger to establish that the new adoption is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of this chapter.<sup>3</sup>

In order to find the County's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made."<sup>4</sup>

Within the framework of state goals and requirements, the Board must grant deference to local governments in how they plan for growth:

In recognition of the broad range of discretion that may be exercised by counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter, the legislature intends for the boards to grant deference to the counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community. RCW 36.70A.3201 (in part).

In sum, during compliance proceedings the burden remains on the Petitioner to overcome the presumption of validity and demonstrate that any action taken by the County is clearly erroneous in light of the goals and requirements of Chapter 36.70A RCW (the Growth

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<sup>1</sup> RCW 36.70A.300(3)(b).

<sup>2</sup> RCW 36.70A.330(1) and (2).

<sup>3</sup> RCW 36.70A.320(1), (2), and (3).

<sup>4</sup> *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

1 Management Act).<sup>5</sup> Where not clearly erroneous and thus within the framework of state  
2 goals and requirements, the planning choices of the local government must be granted  
3 deference.

### 4 5 **III. PROCEDURAL HISTORY**

6 On September 10, 2007, a Petition for Review was filed in Case No. 07-1-0013 alleging  
7 *inter alia* non-compliance with the GMA relating to Stevens County's inadequate protection  
8 of critical areas because of the County's failure to enact design standard regulations,  
9 specifically those set forth in Stevens County Code (SCC) 3.11 and 3.16, to protect all the  
10 functions and values of critical areas.<sup>6</sup> On October 6, 2008, the Board issued a Final  
11 Decision and Order finding Stevens County in non-compliance.  
12

13  
14 The First Order on Compliance Finding Continuing Non-Compliance was issued on April 16,  
15 2009. On May 8, 2009 the Board issued an Order on Reconsideration, denying the  
16 County's Motion for Reconsideration. Subsequently, Stevens County filed an appeal of the  
17 Board's First Order on Compliance and the Board's Order on Motion for Reconsideration in  
18 the Superior Court for Stevens County.  
19

20 In the Board's Second Order on Compliance, dated October 6, 2009, the Board found that  
21 Steven's County failed to take any legislative action to achieve compliance with the GMA  
22 and, for that reason, the Board entered a Finding of Continuing Non-Compliance. In  
23 addition, the County failed to file a Statement of Actions Taken to Comply (SATC) prior to  
24 the Compliance Hearing.  
25

26  
27 On June 10, 2010, the Superior Court issued its Memorandum Decision on Appellate  
28 review, affirming the EWGMHB decisions. Subsequently, Stevens County filed an appeal of  
29 the Board's First Order on Compliance, Order on Reconsideration, in the Court of Appeals  
30 of the State of Washington. On June 10, 2012, the Washington Appellate County affirmed  
31 the EWGMHB decisions.  
32

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<sup>5</sup> RCW 36.70A.320(2).

<sup>6</sup> FDO, at 52-53.

1 Subsequently, Stevens County filed a request with the Supreme Court of the State of  
2 Washington to consider review. On February 8, 2012, the Supreme Court denied the  
3 County's petition for review.  
4

5  
6 On May 15, 2012, the EWGMHB issued their Order Setting Compliance Schedule, giving  
7 the county 140 days to achieve compliance. On October 31, 2012, the Board issued an  
8 Order Granting Motion to Extend Compliance Deadline to December 3, 2012.  
9

10 On January 18, 2013, Stevens County filed Respondent's Compliance Brief and on January  
11 30, 2013, the EWGMHB held a Telephonic Compliance Hearing, to determine if compliance  
12 had been achieved.  
13

#### 14 IV. DISCUSSION

##### 15 SEPA

16 The State Environmental Policy Act (SEPA) requires environmental review of proposed  
17 legislation and other actions that may significantly affect the quality of the environment.<sup>7</sup>  
18 Adoption of comprehensive plans and development regulations are "actions" as defined  
19 under SEPA, and counties/cities must comply with SEPA when adopting new or amended  
20 comprehensive plans and development regulations.<sup>8</sup> SEPA compliance for development  
21 regulations should concentrate on the difference among alternative means of successfully  
22 implementing the goals and policies of the comprehensive plan.<sup>9</sup>  
23  
24

25 The County's SEPA Responsible Official must make a SEPA Threshold Determination early  
26 enough in the process so that the appropriate environmental document can accompany or  
27 be combined with a proposed GMA action.<sup>10</sup> A Threshold Determination is not required  
28 when there has been a previous threshold determination or a notice of adoption or an  
29  
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32 <sup>7</sup> RCW 43.21C.030.

<sup>8</sup> WAC 365-196-620(1).

<sup>9</sup> WAC 365-196-620(3)(h).

<sup>10</sup> WAC 197-11-230(2).

addendum is prepared, except when a new threshold determination is otherwise required.<sup>11</sup> Amendments to Title 3 of the Stevens County Code require consistency with SEPA procedures.<sup>12</sup>

On September 25, 2012, the Department of Ecology sent a letter to the Stevens County Planning Department regarding the proposed Development Regulation Amendments to Title 3 of the Stevens County Code.<sup>13</sup> Regarding Ordinance 2012-05, Stevens County claims a SEPA Threshold Determination is not required under WAC 197-11-230(3) because existing environmental documents provide adequate environmental documentation.<sup>14</sup>

However, Ecology stated that WAC 197-11-230(3) is not applicable to this proposal:

Even though there are previous related proposals due to the Eastern Washington Growth Management Hearings Board Final Decision, it appears there is no record of a previous SEPA document for the current proposed amendments. If this is indeed a new agency action as defined in WAC 197-11-704(2)(b)(i) to which exemptions do not apply, environmental review is required.<sup>15</sup>

In the present case, the record indicates that no environmental review was conducted for Ordinance 2012-05. Moreover, the record contains no previous Threshold Determination, Notice of Adoption, or SEPA Addendum for Ordinance 2012-05. The Board is left with the firm and definite conviction that a mistake has been made in failing to conduct any SEPA review for Ordinance 2012-05.

## CRITICAL AREAS PROTECTION

### 1. Applicable Law

Each county shall designate where appropriate: "Critical areas." RCW 36.70A.170(1)(d).

The term "Critical areas" is defined as including the following areas and ecosystems:

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<sup>11</sup> WAC 197-11-230(3).

<sup>12</sup> First Order on Compliance (April 16, 2009), p. 26.

<sup>13</sup> Respondent's Compliance Brief, Attachment 15 (Jan. 18, 2013) [Department of Ecology Letter dated September 25, 2012].

<sup>14</sup> *Id.* at 1.

<sup>15</sup> *Id.*, p. 2.

- 1 (a) wetlands;  
2 (b) areas with a critical recharging effect on aquifers used for potable water;  
3 (c) fish and wildlife habitat conservation areas;  
4 (d) frequently flooded areas; and  
5 (e) geologically hazardous areas.<sup>16</sup>

6 Each county shall adopt development regulations that protect designated critical areas  
7 RCW 36.70A.060(2). The term “development regulations” is defined as:

8 ...the controls placed on development or land use activities by a county or city,  
9 including, but not limited to, zoning ordinances, critical areas ordinances,  
10 shoreline master programs, official controls, planned unit development  
11 ordinances, subdivision ordinances, and binding site plan ordinances together  
12 with any amendments thereto.

13 Development regulations shall be consistent with and implement the comprehensive plan.

14 RCW 36.70A.040(4)(d).<sup>17</sup>

15 In designating and protecting critical areas, the GMA requires that “counties and cities shall  
16 include the best available science (BAS) in developing policies and development regulations  
17 to protect the functions and values of critical areas. In addition, counties and cities shall give  
18 special consideration to conservation or protection measures necessary to preserve or  
19 enhance anadromous fisheries.” RCW 36.70A.172(1).

20 Evidence of the best available science must be included in the record and must be  
21 considered substantively in the development of critical areas policies and regulations.<sup>18</sup>

22 “Although BAS does not require the use of a particular methodology, at a minimum BAS  
23 requires the use of a scientific methodology.”<sup>19</sup> Although a county need not develop  
24 scientific information through its own means, it must rely on scientific information and must  
25 analyze that information using a reasoned process.<sup>20</sup> Department of Commerce Guidelines

26 <sup>16</sup> RCW 36.70A.030(5).

27 <sup>17</sup> See also RCW 36.70A.060(3), RCW 36.70A.120; and RCW 36.70A.130(1)(d).

28 <sup>18</sup> *Honesty in Envtl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn.  
29 App. 522, 532, 979 P.2d 864 (1999).

30 <sup>19</sup> *Ferry County v. Concerned Friends of Ferry County*, 155 Wn. 2d. 824, 837 (2005).

31 <sup>20</sup> *Id.* at 836-837.

1 state that a county should address on the record “the relevant sources of best available  
2 scientific information included in the decision-making.”<sup>21</sup>

3  
4 If a county chooses to disagree with or ignore scientific recommendations and resources  
5 provided by state agencies or Indian tribes, which a county could do, the county must  
6 unilaterally develop and obtain valid scientific information.<sup>22</sup> The GMA does not require a  
7 county to follow BAS; rather it is required to “include” BAS in its record. A county may depart  
8 from BAS if it provides a reasoned justification for such departure.<sup>23</sup>  
9

10 RCW 36.70A.070(1) states that the comprehensive plan land use element shall review  
11 drainage, flooding, and stormwater run-off in the area and provide guidance for corrective  
12 actions to mitigate or cleanse those discharges that pollute waters of the state.  
13

14 RCW 36.70A.170(2) provides that in making critical areas designations, counties and cities  
15 shall consider the guidelines established by the Department of Commerce pursuant to RCW  
16 36.70A.050(1). Under RCW 36.70A.050, these are “minimum guidelines” that apply to all  
17 jurisdictions “to guide the classification” of critical areas. The Department of Commerce  
18 “minimum guidelines” are codified in WAC Chapter 365-190.  
19  
20

21 WAC 365-190-080(4) provides that counties and cities should use performance standards  
22 to protect critical areas. In accomplishing this task, Counties and cities are encouraged to  
23 *inter alia* develop regulatory standards that serve to protect these critical areas and  
24 Counties should use performance standards to protect critical areas when a land use permit  
25 decision is made.  
26

27 In *Stevens County v. Futurewise*, the Court of Appeals stated “the GMA requires [Stevens  
28 County] to designate and protect all critical areas within its boundaries.”<sup>24</sup>  
29  
30

31 <sup>21</sup> WAC 365-195-915(1)(b).

32 <sup>22</sup> *Id.* at 836.

<sup>23</sup> *Swinomish Indian Tribal Community v. WWGMHB*, 161 Wn.2d 415, 430-431 (2007).

<sup>24</sup> *Stevens County v. Futurewise*, 146 Wn. App. 512 (2008), review denied *Stevens County v. Futurewise*, 165 Wn. 2d 1038 (2009).

1  
2 **2. Prior Orders finding GMA non-compliance**

3 In its Final Decision and Order (October 6, 2008), the Board found and concluded *inter alia*:

- 4 • Stevens County is not protecting Critical Areas as required by the GMA pursuant to  
5 RCW 36.70A.060, .172, .020(9), and .020(10) by enacting design standard  
6 development regulations, SCC 3.11 Subdivisions and SCC 3.16 Short Subdivisions  
7 which protect all of the functions and values of critical areas.
- 8 • Ordinance 2007-1 is non-compliant with the GMA's requirements in regard to critical  
9 area protection as to the application of impervious surface coverage limitation and  
10 the consideration of stormwater discharges.

11  
12 In its First Order on Compliance (April 16, 2009), the Board determined that although  
13 Stevens County had amended its development regulations, it failed to enact legislation  
14 which complies with the Growth Management Act's requirements to protect the functions  
15 and values of critical areas. The Board found and concluded *inter alia*:

- 16  
17 • The October 2008 FDO required the County to consider the effects of impervious  
18 surface coverage and storm water discharge on critical areas throughout the County.
- 19 • Scientific literature demonstrates the relationship between increased impervious  
20 coverage, storm water flow, and critical areas impacts.
- 21 • The amendatory language, in regards to impervious surface, is limited to rural areas  
22 and does not address urban areas.
- 23 • The GMA requires protection of the functions and values of critical areas through  
24 RCW 36.70A.020(9), .020(10), .060(2), .170, and .172.
- 25 • Washington State Law does not preclude the establishment of a fixed percentage-  
26 based restriction so long as that restriction is related to the impacts of the proposed  
27 development.
- 28 • The GMA requires protection of critical areas from further degradation, not the  
29 minimization of impacts.
- 30  
31  
32



- Development regulations should provide for clear, specific standards so as to prevent arbitrary and discretionary application.
- The County does not establish technical design standards, maximum coverage limitations, or best management practices nor does it provide for guidance from the Department of Ecology's Stormwater Manual for Eastern Washington.
- The Petitioners have demonstrated Stevens County failed to comply with the Board's October 2008 FDO and specifically RCW 36.70A.020(10), .060(2), and .172, by failing to enact development regulations which ensure the functions and values of the County's designated critical areas are protected from further degradation.

The Board found continuing non-compliance in its Second Order on Compliance. At the time, Stevens County had failed to take any additional legislative actions to achieve compliance and at the time of the hearing had not filed a Statement of Actions Taken to Comply (SATC).

Therefore, since the Board has continued to find non-compliance, the issue to be addressed in this compliance proceeding is based on the issues for which the Board originally found Stevens County non-compliant in the October 2008 FDO. Namely, does Stevens County Code (SCC) Chapter 3.11 and Chapter 3.16 provide for design standards which protect the functions and values of critical areas in Stevens County from the effects of storm water discharge and impervious coverage?

### **3. Prior Court Orders**

On June 14, 2010, the Superior Court for Stevens County entered a judgment upholding the Board's decisions and orders in this case.<sup>25</sup>

On June 28, 2011, the Court of Appeals upheld the judgment of the Superior Court and affirmed the Board's actions in this case.<sup>26</sup> The Court of Appeals held in pertinent part as follows:

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<sup>25</sup> Stevens County Superior Court Cause No. 09-2-00312-1, Rebecca M. Baker, Judge.

Moreover, the record shows substantial evidence that the subdivision code fails to protect critical areas. The Board found the SCC Title 3 amendments insufficient to satisfy RCW 36.70A.060(2) for three reasons: (1) minimizing impacts does not protect further degradation as required by the GMA; (2) the amendments do not apply county-wide as directed by the final decision and order; and (3) they provide **no standards or guidance** for local decision makers. The words “minimize the effects” do not mean the same thing as “protect.” Chapters 3.11 and 3.16 SCC do not address impervious surface coverage in multiple important contexts, addressing impervious surfaces solely in certain subsets of the urban residential and rural agriculture areas. The amendments do not apply county-wide and do not mention methods for addressing storm water or impervious surface coverage.

Given all, we conclude the Board did not err in determining overall that SCC Title 3 fails to protect critical areas. . . .

Considering all, we conclude the Board did not impose a tax by suggesting the County use fixed percentage-based limits on impervious surface coverage.<sup>27</sup>

#### 4. Recent Legislative Action by Stevens County

On December 3, 2012, the Board of Stevens County Commissioners adopted ordinance No. 2012-05 in response to the Board’s April 16, 2009 Compliance Order.<sup>28</sup> The new ordinance made the following changes to Title 3 of the Stevens County Code:

- SCC Sections 3.11.230(H) and 3.16.232(H) are amended to read: When critical areas may be impacted, ensure that lot design protects the functions and values of critical areas from potential impacts created by impervious surfaces and storm water run-off consistent with SCC Title 13, SCC 3.04.020, and SCC 3.80.<sup>29</sup>
- New Sections SCC 3.11.225 and SCC 3.16.225 are added: A stormwater/impervious checklist review checklist must be submitted when:
  - A. Critical areas are present or are within 200 feet of the project boundary and/or
  - B. Proposed land disturbance exceeds 10% of the project area.

<sup>26</sup> *Stevens County v. The Eastern Washington Growth Management Hearings Board*, 163 Wn. App. 680; 262 P.3d 507 (June 28, 2011), review denied *Stevens County v. EWGMHB*, 173 Wn.2d 1019; 272 P.3d 247 (Feb. 8, 2012).

<sup>27</sup> *Id.* at 163 Wn. App. 680, 694-696 (emphasis added).

<sup>28</sup> Respondent’s Compliance Brief (January 18, 2013), Exhibit 48, p. 1.

<sup>29</sup> *Id.*, p. 3.

1 The project proposal and checklist (if required) shall be reviewed consistent  
2 with SCC 13.30.032 to evaluate the potential adverse impacts from storm  
3 water/impervious surfaces to critical areas. If adverse impacts are identified, a  
4 storm-water/impervious surface management plan shall be submitted and  
5 approved prior to development activities. The plan shall be prepared by a  
6 qualified professional consistent with SCC 13.00.034 and SCC 3.04.020 to  
7 ensure the protection of the functions and values of critical areas.<sup>30</sup>  
8

### 9 **5. Positions of the Parties**

10 Petitioners argue that Stevens County continues to fail to properly protect its critical areas  
11 for the following reasons:  
12

- 13 a. It fails to include all critical areas, including those in urban areas.<sup>31</sup>
- 14 b. It fails to provide a standard of review, or a threshold, for use with the  
15 Subdivision checklist, by which the planner would clearly require additional  
16 analysis of project impacts on storm water and impervious surfaces and its  
17 related effects on critical areas.<sup>32</sup>
- 18 c. The checklist fails to address previous development levels on the property.<sup>33</sup>
- 19 d. The County has still failed to provide adequate design standards for  
20 impervious surfaces which places some direct limitations on impervious  
21 surfaces appropriate to the subdivision proposal.<sup>34</sup>
- 22 e. The County has still failed to adequately address stormwater runoff.<sup>35</sup>  
23  
24

25 The Petitioner asserts that the County has added the potential use of a professional, but  
26 gives total discretion to that professional.<sup>36</sup> The Petitioner alleges that there is no certainty  
27 that the effects of storm water run-off or impervious surface coverage will be reviewed or a  
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30 <sup>30</sup> *Id.*, p 2, 3.

31 <sup>31</sup> Petitioner's Reply to Statement of Actions Taken (January 4, 2013), p. 2.

32 <sup>32</sup> *Id.*, p. 4.

<sup>33</sup> *Id.*, p. 5.

<sup>34</sup> *Id.*, p. 7.

<sup>35</sup> *Id.*, p. 20.

<sup>36</sup> *Id.*, p. 21.

1 management plan required, or appropriate actions taken to protect critical areas in Stevens  
2 County if the planner has no standards or guidelines to use in applying and interpreting the  
3 check list.<sup>37</sup> In addition, Petitioners state the County does not establish any technical  
4 design standards or best management practices for the professionals to use.<sup>38</sup> As a result,  
5 according to Petitioners the County is still failing to provide clear direction for the planners  
6 and the professionals to protect critical areas.  
7

8 Stevens County argues it now complies with the GMA because of the following actions:  
9

- 10 a. It has amended its subdivision codes to require the protection of critical areas  
11 from the impact of impervious surfaces and stormwater runoff.<sup>39</sup>
- 12 b. It requires subdivision applicants to prepare a stormwater/impervious surface  
13 management checklist when critical areas are present or within 200 feet of the  
14 project boundary or the proposed land disturbance exceeds 10% of the project  
15 area.<sup>40</sup>
- 16 c. Based on the checklist, the County may require an additional Stormwater  
17 Management Plan to be prepared by a qualified professional to ensure the  
18 protection of the functions and values of critical areas.<sup>41</sup>
- 19 d. The new regulations apply County wide, including urban and rural areas.<sup>42</sup>  
20  
21

## 22 **6. Board Analysis – Adequate Protection of Critical Areas**

### 23 **County wide critical area protection**

24 Petitioner argues that in its new ordinance Stevens County continues to fail to include all  
25 critical areas, including those in urban areas, because the County only wrote changes  
26 reflecting critical areas inside of rural areas.<sup>43</sup>  
27  
28  
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30 <sup>37</sup> *Id.*, pp. 4, 5.

31 <sup>38</sup> *Id.*, p. 21.

32 <sup>39</sup> Stevens County Second Compliance Brief, p. 1.

<sup>40</sup> *Id.*, p. 3.

<sup>41</sup> *Id.*, p. 4.

<sup>42</sup> *Id.*, p. 3.

<sup>43</sup> Petitioner's Reply to Statement of Actions Taken, p. 2.

1 In its Final Decision and Order on October 6, 2008, the Board determined *inter alia*, that  
2 Stevens County is not protecting critical areas as required by the GMA by enacting design  
3 standards in its development regulations in SCC 3.11 Subdivisions and SCC 3.16 Short  
4 Subdivisions, which protect all the functions and values of critical areas.<sup>44</sup> These sections  
5 of County Code cover the entire County.  
6

7 In its First Order on Compliance, the Board noted that amendments to the County's  
8 development regulations at that time also did not apply County wide, "In addition this  
9 language is limited to rural areas and fails to address similar situations in urban areas."<sup>45</sup>  
10

11 The Board notes that new sections of the County's development regulations concerning a  
12 storm-water/impervious checklist do apply County wide. Two other new code sections  
13 requiring protection of critical areas through lot design do not apply to the Urban Growth  
14 areas of Stevens County. Petitioner shows that County ordinance No. 2012-05 amends  
15 SCC sections 3.11.225 and 3.16.225, which refer to design standards for rural and  
16 agricultural areas, whereas the sections for urban growth areas are not being revised.<sup>46</sup>  
17 Although these two new sections do not cover Urban Growth Areas, the Board notes that  
18 these sections do not provide any specific design or performance standards to protect  
19 critical areas from stormwater and impervious surface runoff.  
20  
21

### 22 **Performance standards for stormwaters and impervious surfaces**

23

24 Petitioner points out that although the County requires a new Stormwater/Impervious  
25 Surface Review checklist for subdivisions, the County has failed to provide a standard of  
26 review, or threshold for use with the checklist, by which the planner determines additional  
27 review is needed.<sup>47</sup> Based on the checklist, the County may require the use of a  
28 "professional," if determined necessary, to determine what type of critical protection  
29 methods are needed to protect critical areas, but gives total discretion to the professionals,  
30  
31

32 <sup>44</sup> FDO at 62.

<sup>45</sup> First Order on Compliance, p. 23.

<sup>46</sup> Petitioners Reply to Statement of Actions Taken, Attachment 2.

<sup>47</sup> *Id.*, p. 4.

1 to ensure that lot design does not impact the functions and values of critical areas.<sup>48</sup> The  
2 County Code presents no guidance for the standards the County expects the professionals  
3 to use.<sup>49</sup> The County doesn't establish any technical design standards or best management  
4 practices.<sup>50</sup> So, for example, would the design standard for storm water run-off be based on  
5 a 1 year or 25 year storm design?<sup>51</sup> It is the County that is given the responsibility to write  
6 development regulations which should provide adequate direction, standards, methods to  
7 be used, that would then in turn provide specific guidance to the professional.<sup>52</sup> For  
8 example, a storm water design standard might require that the flow from the property not  
9 exceed the pre-development level.<sup>53</sup>

11  
12 In its Final Decision and Order, the Board determined that:

13 DRs Title 3 can be utilized to amplify protections set forth in a jurisdiction's CAO  
14 by setting forth simple design standards, such as those suggested by the  
15 Petitioners -- limitations on impervious coverage and consideration of storm  
16 water runoff.<sup>54</sup>

17 Setting limitations for impervious surface within SCC 3.11 Subdivisions and 3.16  
18 Short Subdivisions, the design standard sections specifically addressed by the  
19 Petitioners, is a nominal and easily accomplished amendment that will serve in  
20 providing protections to the functions and values and critical areas throughout  
21 Stevens County, especially in relationship to CARAs.<sup>55</sup>

22 In its First Order on Compliance, the Board determined that *inter alia*, there are no defined  
23 standards to guide decision makers except to note that lot design is to minimize the effect  
24 consistent with the CAO and SEPA regulations. The Board recognizes the need to have  
25 development regulations which provide for clear, specific standards so as to prevent  
26 arbitrary and discretionary application. The new language does not establish technical  
27 design standards, maximum coverage limitation, or best management practices. In other  
28

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29 <sup>48</sup> *Id.*, p. 21.

30 <sup>49</sup> *Id.*, p. 4.

31 <sup>50</sup> *Id.*, p. 21.

32 <sup>51</sup> *Id.*, p. 22.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> FDO, p. 49.

<sup>55</sup> *Id.*, p. 50.

1 words, the County fails to denote the methods by which storm water issues will be  
2 considered or any measure by which impervious coverage could be addressed.<sup>56</sup>

3  
4 The Board notes that Stevens County Ordinance No. 2012-05, provides for additional  
5 review and, potentially, additional controls to protect critical areas from the impacts of  
6 stormwater and impervious surface runoff county-wide but still does not provide adequate  
7 guidance to either the planners who will review the required checklist or to the professionals  
8 who may be required to submit a management plan. The planners have no guidance to  
9 help them determine the threshold for requiring an additional management plan, and there  
10 are no County design standards for use by the professionals in deciding on the level and  
11 methods of protection needed for critical areas.  
12

#### 13 **Best available science**

14 In County Ordinance No. 2012-05, Stevens County included findings that the record  
15 includes best available science that demonstrates functions and values of critical areas are  
16 not typically degraded by runoff from impervious surfaces covering less than ten percent of  
17 a watershed and that impervious surface coverage does not and will not approach ten  
18 percent for any basin or sub-basin in Stevens County now or in the foreseeable future.<sup>57</sup>  
19

20  
21 In the Hearing on the Merits, the County also emphasized the 10% threshold and also  
22 reported that the County conducted a study of the Sheep Creek watershed, and found that  
23 the impervious surface levels are well under 10%.<sup>58</sup>  
24

25 In the Hearing on the Merits, the Petitioner argues that regardless of whether the sub-basin  
26 is developed to the 10% level, heavy pollution and degradation is occurring in these areas,  
27 along with impacts to wildlife and wildlife habitat.<sup>59</sup> Also, impacts placed closer to critical  
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30  
31

32 <sup>56</sup> EGMHB First Order of Compliance, p. 23.

<sup>57</sup> Respondents Compliance Brief, Index 48, p. 2.

<sup>58</sup> *Id.*, Index 44, p. 1.

<sup>59</sup> Petitioners Reply to Statement of Actions Taken, p. 10.

1 areas, like adjacent to lakes and rivers, have a greater impact than farther up the sub-  
2 basin.<sup>60</sup>

3  
4 Petitioner provided a study of the Impacts of Impervious Cover on Aquatic Systems, by the  
5 Center for Watershed Protection that reports that the 10% threshold for impervious  
6 coverage is not such a good indicator of watershed health:

7 Quite simply, the influence of IC [impervious coverage] in the one to 10% range  
8 is relatively weak compared to other potential watershed factors, such as  
9 percent forest cover, riparian continuity, historical land use, soils, agriculture,  
10 acid mine drainage or a host of other stresses. Consequently, watershed  
11 managers should never rely on IC alone to classify and manage streams in  
12 watersheds with less than 10% IC.<sup>61</sup>

13 DOE's Stormwater Management Manual for Eastern Washington provides guidance on  
14 runoff treatment practices for reducing the impacts of pollutant-laden stormwater from  
15 individual sites through source control, construction stormwater pollution prevention, and  
16 water quality treatment best management practices.<sup>62</sup> The Manual reports that:

17  
18 Research has shown that as developed impervious areas reach five percent of  
19 land cover within a watershed, the connection between runoff from impervious  
20 areas and channel response through erosion begins to occur (Hajda, 1999;  
21 Hollis, 1975; and Booth, 1991).<sup>63</sup>

22 Although the 10% impervious coverage threshold is a general indicator of degradation, it  
23 does not replace the continued need for clear, specific design and performance standards in  
24 Stevens County's development regulations.

## 25 26 **7. Conclusions**

27 Stevens County has not complied with SEPA or achieved compliance with the GMA by  
28 enacting performance or design standards in its development regulations in SCC 3.11  
29 Subdivisions and SCC 3.16 Short Subdivisions, which protect all the functions and values of  
30

31  
32 <sup>60</sup> *Id.*, p. 12.

<sup>61</sup> *Id.*, Attachment 8, p. 6.

<sup>62</sup> *Id.*, Attachment 10, p. 1-9.

<sup>63</sup> *Id.*, Attachment 10, p. 1-10.



critical areas in both urban and rural areas of Stevens County. Stevens County's Development Regulations should provide for clear, specific standards so as to prevent arbitrary and discretionary application, but the County has not established technical design standards, maximum coverage limitations, or best management practices.

The Petitioners have satisfied their burden of proof to demonstrate Stevens County has failed to comply with the Growth Management Act and specifically RCW 36.70A.020(9), .020(10), .060(2), and .172, by failing to enact development regulations which ensure the functions and values of the County's designated critical areas are protected from further degradation. In addition, in adopting Ordinance No. 2012-05, Stevens County has not complied with SEPA requirements in RCW 43.21C.030, WAC 365-196-620, and WAC 197-11-230.

The Board is left with the firm and definite conviction that a mistake has been made by Stevens County failing to enact development regulations which ensure the functions and values of the County's designated critical areas are protected from further degradation. Stevens County Ordinance 2012-05 is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the Growth Management Act and SEPA.

#### **V. ORDER**

Stevens County is not in compliance with SEPA and the requirements of the Growth Management Act with regard to the protection of all the functions and values of critical areas from the effects of storm water discharge and impervious coverage in accordance with RCW 36.70A.060(2), RCW 36.70A.040(4)(d), RCW 36.70A.170(2), RCW 43.21C.030 and WAC 365-190-080.

This case is remanded to Stevens County. Stevens County is ordered to bring its Comprehensive Plan and Development Regulations into compliance with the Growth Management Act according to the following schedule:

Item	Date Due
Compliance Due	July 12, 2013
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	July 26, 2013
Objections to a Finding of Compliance	August 9, 2013
Response to Objections	August 19, 2013
<b>Compliance Hearing – Telephonic Call 1-800-704-9804 and use pin 4771313#</b>	<b>August 29, 2013 10:00 a.m.</b>

Entered this 22nd day of February, 2013.

\_\_\_\_\_  
Charles Mosher, Board Member

\_\_\_\_\_  
Raymond L. Paoletta, Board Member

**Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.<sup>64</sup>**

<sup>64</sup> Should a party choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840. A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.